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IN THE COURT OF APPEALS OF INDIANA

DWAYNE JAMES HOARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0607-CR-594
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas A. Busch, Judge
Cause No. 79D02-0507-FC-65

February 14, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Dwayne James Hoard appeals his aggregate sentence of seventeen years with five suspended consisting of five years for robbery, a Class C felony, and twelve years for burglary, a Class B felony. Hoard raises two issues, which we restate as whether the trial court properly sentenced Hoard and whether Hoard's sentence is inappropriate given his character and the nature of the offenses. Concluding that the trial court properly sentenced Hoard and that his sentence is not inappropriate, we affirm.

Facts and Procedural History

On November 22, 2004, Hoard broke a window and gained entry to a dwelling with the intent to commit theft therein. While inside the dwelling, he stole jewelry and other personal property from the dwelling's owner. On July 20, 2005, Hoard entered a Village Pantry store, approached the clerk, and told her that he was going to rob the store and wanted all the money in the cash register. During the encounter, Hoard kept his hand in his pocket in an attempt to indicate he had a weapon.

On July 22, 2005, in conjunction with the Village Pantry incident, the State charged Hoard with robbery, a Class C felony, theft, a Class D felony, and with being an habitual offender. On March 8, 2006, in conjunction with the residential break-in, the State charged Hoard with burglary, a Class B felony, and theft, a Class D felony. On March 27, 2006, Hoard entered into a plea agreement under which he agreed to plead guilty to robbery and burglary in exchange for the State's agreement to drop the remaining charges. The plea agreement also indicates that Hoard waived his right to have a jury determine aggravating

circumstances, and that the sentences imposed by the trial court would be served consecutively.

On May 17, 2006, the trial court held a sentencing hearing and entered an Order sentencing Hoard to five years for robbery and twelve years for burglary, to be served consecutively. The trial court ordered Hoard to serve ten of these years at the Indiana Department of Correction, two years at Tippecanoe County Community Corrections, and five years suspended to supervised probation with the first year to be served on house arrest. In its Order, the trial court made the following statements regarding aggravating and mitigating circumstances:

> The Court finds as aggravating factors that the defendant has a history of criminal and delinquent activity, the defendant has a long-term substance abuse history, and there have been prior attempts at rehabilitation that have been unsuccessful.
>
> The Court finds as mitigating factors the defendant has taken responsibility for his actions by entering a guilty plea, and the defendant has serious health problems.
>
> The Court further finds that the aggravating factors outweigh the mitigating factors.

Appellant's Appendix at 21.

Hoard now appeals his sentence.

Discussion and Decision

I. The Trial Court Properly Sentenced Hoard

Hoard argues that the trial court improperly ignored mitigating circumstances in its sentencing decision. Before addressing the merits of Hoard's argument, we must discuss the recent change in Indiana's sentencing scheme. In 2004, the United States Supreme Court

decided Blakely v. Washington, 542 U.S. 296 (2004), an opinion that called into question the constitutionality of Indiana's current sentencing scheme. Our legislature responded to Blakely by amending our sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. For Hoard's robbery conviction, the advisory sentencing scheme applies, as he committed the robbery and was sentenced after the new statute took effect. On the other hand, Hoard committed the burglary before the new statute's effective date, but was sentenced after. Under these circumstances, there is a split on this court as to whether the advisory or presumptive sentencing scheme applies. Compare Settle v. State, 709 N.E.2d 34, 35 (Ind. Ct. App. 1999) (sentencing statute in effect at the time of the offense, rather than at the time of conviction or sentencing, controls) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and therefore application of advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though offense was committed before). Our supreme court has not explicitly ruled which sentencing scheme applies in these situations, but a recent decision seems to indicate that the date of sentencing is the critical date. In Prickett v. State, 856 N.E.2d 1203 (Ind. 2006), the defendant committed the crimes and was sentenced prior to the amendment date. In a footnote, our supreme court states that "[w]e apply the version of the statute in effect at the time of Prickett's sentence and thus refer to his 'presumptive' sentence, rather than an 'advisory' sentence." Id. at 1207 n.3 (emphasis added); see also

Davidson v. State, 849 N.E.2d 591, 595 n.4 (Ind. 2006) ("[S]ince [defendant] was sentenced prior to 2005, we analyze his sentence under the former system." (emphasis added)).

Under the presumptive sentencing scheme, if the trial court imposes a sentence in excess of the statutory presumptive sentence, it must identify and explain all significant aggravating and mitigating circumstances and explain its balancing of the circumstances. Rose v. State, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004). Although our supreme court has not yet interpreted the amended statute, its plain language seems to indicate that under the advisory scheme, "a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances." Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006), trans. denied. However, if a trial court does find, identify, and balance aggravating and mitigating factors, it must do so correctly, and we will review the sentencing statement to ensure that the trial court did so. See Ind. Code § 35-38-1-3 ("if the court finds aggravating circumstances or mitigating circumstances, [the trial court shall record] a statement of the court's reasons for selecting the sentence that it imposes"). Therefore, because the trial court here identified and weighed aggravating and mitigating circumstances, the analysis and result are the same under both sentencing schemes, and we need not determine the issue of retroactivity herein. See Primmer v. State, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006), trans. denied.

A. Standard of Review

Sentencing determinations are within the sound discretion of the trial court, and we will reverse only for an abuse of discretion. Henderson v. State, 848 N.E.2d 341, 344 (Ind. Ct. App. 2006). We will find the trial court abused its discretion only when its decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

B. Finding of Mitigating Circumstances

Hoard claims that the trial court improperly overlooked the mitigating circumstances of his mental illness and the hardship Hoard's incarceration will cause his dependants. We disagree.

Although the trial court has an obligation to consider all mitigating circumstances identified by a defendant, it is within the trial court's sound discretion whether to find mitigating circumstances. Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), trans. denied. We will not remand for reconsideration of alleged mitigating factors that have debatable nature, weight, and significance. Id. However, if the record clearly supports a significant mitigating circumstance not found by the trial court, we are left with the reasonable belief that the trial court improperly overlooked the circumstance. Moyer v. State, 796 N.E.2d 309, 313 (Ind. Ct. App. 2003).

With regard to Hoard's mental illness, our supreme court has identified four factors that should be considered when considering a defendant's mental illness and its effect on sentencing: "(1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the

commission of the crime." Ankney v. State, 825 N.E.2d 965, 973 (Ind. Ct. App. 2005), trans. denied (citing Archer v. State, 689 N.E.2d 678, 685 (Ind. 1997)). We have previously concluded that a defendant with no criminal history "who is suffering from a severe, longstanding mental illness that has some connection with the crime(s) for which he was convicted and sentenced is entitled to receive considerable mitigation of his sentence." Biehl v. State, 738 N.E.2d 337, 340 (Ind. Ct. App. 2000), trans. denied. On the other hand, where a defendant is "capable of controlling his behavior, did not have significant limitations on his functioning, and failed to identify a nexus between his mental illness and the instant offense," mental illness should not be as significant a factor for sentencing. Scott v. State, 840 N.E.2d 376, 384 (Ind. Ct. App. 2006), trans. denied (concluding that defendant's mental illness should have been given little weight).

Here, an evaluation conducted for the presentence report indicates that Hoard "meets the diagnostic criteria for Major Depressive Disorder, Severe, with Psychotic Features, Panic Disorder without Agoraphobia, and Polysubstance Dependence, in Partial Remission." Appellant's Green Appendix at 19. The evaluator opined that Hoard's mental illness should be considered as a mitigating factor. The evaluator also stated, "at the time of the alleged offense, it appears that [Hoard's] decisions and behavior were significantly impaired as a result of acute polysubstance intoxication." Id. At the sentencing hearing, Hoard did not discuss his mental condition at length, and focused on his physical illness[1] and his drug use. Hoard testified that on the night of the robbery, he had ingested crack cocaine, Xanax, and

Loratabs, and that on the night of the burglary, he had taken Xanax.

Considering the factors relevant to the effect of a defendant's mental illness on sentencing, we conclude that the trial court did not abuse its discretion in not finding Hoard's mental illness to be a significant mitigating factor. Hoard made no showing of a substantial nexus between his mental conditions and the commission of the crimes. Although the evaluator opined that Hoard's mental conditions may have "contributed to his reported substance binge," id. at 19, Hoard has made no showing that his mental illness itself contributed to his commission of the crimes. Significantly, Hoard testified he has repeatedly failed to seek treatment for his substance abuse problems, despite court orders, because "I guess I didn't want to really," sentencing transcript at 25, and the record indicates he has failed to follow through with recommendations that he seek counseling for his mental illnesses. Hoard also failed to demonstrate or present any evidence that his mental illness left him incapable of controlling his behavior or significantly limited his ability to function. Based on these factors, we conclude Hoard's mental illness was not a significant mitigating circumstance clearly supported by the record. See Scott v. State, 840 N.E.2d at 384.

Based on the recommendations of the evaluator contained in the presentence report, the better course would have been for the trial court to mention Hoard's history of mental illness or explain its decision to not find it as a mitigating factor. However, because the record does not clearly support Hoard's illness as a significant mitigating factor, the trial court did not abuse its discretion in not identifying it as one.

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[1] Hoard has Crohn's disease, a fact the trial court recognized and discussed at the sentencing hearing.

With regard to the hardship imposed on Hoard's dependants, a trial court "is not required to find a defendant's incarceration would result in undue hardship on his dependents." Davis v. State, 835 N.E.2d 1102, 1116 (Ind. Ct. App. 2005), trans. denied. Indeed, "[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999).

Here, both Hoard's children lived with their mother. See Edwards v. State, 840 N.E.2d 456, 462 (Ind. Ct. App. 2006), trans. denied, cert. denied, 127 S.Ct. 497 (2006) (no undue hardship where defendant had custody of only two of three children and the children had been in mother's care during defendant's pre-trial incarceration). Also, although Hoard testified that he paid child support, Hoard failed to demonstrate the degree to which his children rely upon him for this support. See Anglin v. State, 787 N.E.2d 1012, 1018 (Ind. Ct. App. 2003), trans. denied (trial court did not abuse its discretion in not finding mitigating circumstance where record did not reveal the degree of daughter's reliance upon defendant). Hoard has simply failed to demonstrate that any hardship suffered by his children is "undue" in the sense that it is any worse than that suffered by any children whose father is incarcerated. See Nicholson v. State, 768 N.E.2d 443, 448 n.13 (Ind. 2002). The trial court did not abuse its discretion in not finding undue hardship to be a mitigating factor.

Even if the trial court should have found Hoard's mental illness or undue hardship imposed on his dependants to be significant mitigating factors, any error committed in its

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The trial court also found Hoard's physical illness to be a mitigating factor.

failure to identify them as such was harmless as any mitigating weight assigned to either factor is minimal compared to the aggravating circumstances. See Johnson v. State, 845 N.E.2d 147, 151 (Ind. Ct. App. 2006), trans. denied. The trial court found Hoard's criminal history, substance abuse history, and the fact that prior attempts at rehabilitation had been unsuccessful to be aggravating circumstances. Hoard's criminal history is extensive, consisting of two juvenile adjudications, seven misdemeanor convictions, four felony convictions, and two pending misdemeanor charges. Although Hoard attempted to characterize his criminal history as consisting of "little . . . that indicates he is a danger to the community," sent. tr. at 32, in addition to his drug and alcohol related charges, his convictions include attempted armed robbery, felony theft, resisting law enforcement, criminal trespass, criminal mischief, and conversion. This criminal history indicates that Hoard not only has a history of drug and alcohol offenses, but also that Hoard, whether influenced by drug addictions or not, has committed multiple crimes that endanger others' persons and property. This aggravating factor is clearly entitled to heavy weight. In addition to this criminal history, Hoard has had two petitions to revoke probation filed against him, with one found to be true. On four occasions, a court has ordered that he complete some sort of substance abuse treatment, and on Hoard's own admission, he did not complete such treatment because he "didn't want to." Sent. Tr. at 25. In light of these aggravating circumstances, we conclude that had the trial court erred in failing to find Hoard's mental illness or the undue hardship imposed on Hoard's children to be mitigating circumstances, such error would be harmless. Cf. Scott, 840 N.E.2d at 384 (trial court's failure to identify

two mitigating circumstances entitled to minimal weight was harmless error where defendant had lengthy criminal history and nature of circumstance of the crime was valid aggravator).

II. Appropriateness of Hoard's Sentence

A. Standard of Review

Under Indiana Appellate Rule 7(B), "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this standard, we have "authorization to revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005).

B. Nature of the Offenses and Character of the Offender

When examining the nature of the offense and character of the offender, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). For a Class B felony, the advisory sentence is ten years, the minimum is six, and the maximum is twenty. Ind. Code § 35-50-2-5. For a Class C felony, the advisory sentence is four years, the minimum is two, and the maximum is eight. Ind. Code § 35-50-2-6(a). Therefore, the trial court ordered that Hoard serve sentences slightly higher than those the legislature deems appropriate for the typical B felony burglary[2] and C felony robbery[3] committed by a typical

[2] The elements of burglary as a Class B felony are established when one (1) breaks and enters; (2) a dwelling; (3) with the intent to commit a felony therein. Ind. Code § 35-43-2-1(1)(B).

offender.

Hoard argues that reduction of his sentence is warranted because the crimes "appear to be impulsive rather than planned crimes, and it appears he was not thinking clearly during the commission of either one of them." Appellant's Brief at 10. Although we find nothing in the record that indicates this burglary or robbery is any worse than a typical offense, we also reject Hoard's argument that the apparent impulsive nature of the offenses makes them any less serious or egregious than a typical offense. Neither the actual harm nor the potential harm was reduced by Hoard's failure to carefully plan the crimes.

In regard to Hoard's character, as stated above, Hoard has an extensive criminal history evidencing a disregard for others and the laws of society. Although he now claims that he is willing to undergo treatment to deal with his addictions to drugs and alcohol, he has had repeated opportunities in the past and has failed to cooperate. He has also previously had probation revoked. Hoard eventually accepted some degree of responsibility for his actions by pleading guilty and expressing some degree of remorse at his sentencing hearing. However, when originally questioned about the 2004 burglary, Hoard denied knowledge and refused to cooperate with police, and did not admit that he committed this crime until after the police had acquired DNA evidence conclusively establishing his guilt.[4] Moreover,

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[3] The elements of robbery as a Class C felony are established when one (1) knowingly or intentionally; (2) takes property; (3) from another person; (4) by using or threatening force or putting one in fear. Ind. Code § 35-42-5-1.

[4] Hoard's DNA matched that found inside the dwelling on broken glass from the window Hoard used to enter the dwelling.

substantial evidence existed against Hoard in both cases,[5] and his decision to plead guilty could be viewed as a practical decision in light of the evidence against him.

We acknowledge that Hoard has faced considerable adversity in his life and suffers from a serious physical illness, as well as mental illness. We also note that until the time he was arrested, Hoard was apparently current on his child support payments. This factor is somewhat tempered by the fact that Hoard also admitted to using drugs in front of his children.

Considering all factors relating to Hoard's character, especially his significant criminal history and pattern of failing to respond to alternative forms of rehabilitation, we cannot say that Hoard's sentence of seventeen years, with five years suspended, is inappropriate in light of his character and the nature of the offenses.

Conclusion

We conclude that the trial court properly sentenced Hoard and that his sentence is not inappropriate given his character and the nature of the offenses.

Affirmed.

BAKER, J., and DARDEN, J., concur.

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[5] In the robbery case, Hoard was captured on videotape, from which officers familiar with Hoard identified him. The videotape also depicts a tattoo on Hoard's forearm. An employee working during the robbery also identified Hoard from a photographic array. When officers arrested Hoard, he stated "I didn't have a gun," and then refused to discuss the incident further. Appellant's App. at 10.